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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92056510
Party	Plaintiff Republic of Texas Biker Rally, Inc.
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Attachments	Republic's Request for Final Default Judgment (filed 8.15.13).pdf(887847 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Registration of:

Registrant : Ogudo, Peter C.
Reg. No. : 4,164,790
Mark : ADAM LOOPHOLE PRESENTS ROT APPAREL
Registration Date : June 26, 2012

REPUBLIC OF TEXAS BIKER RALLY, INC.,	:	
Petitioner	:	
	:	
v.	:	Cancellation No. 92056510
	:	
PETER C. OGUDO,	:	
Registrant/Respondent	:	

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**PETITIONER'S REQUEST
FOR FINAL DEFAULT JUDGMENT ON
RESPONDENT'S NON-COMPLIANCE
WITH THE BOARD'S DEFAULT ORDER**

In view of registrant Peter C. Ogudo's ("Respondent's") continued failure to adhere to the rules of practice and his material non-compliance with the Trademark Trial and Appeal Board's (the "Board's") July 18, 2013 Order entering default against Respondent ("Default Order"), Petitioner Republic of Texas Biker Rally, Inc. ("Petitioner") respectfully asks the Board to enter final default judgment against Respondent cancelling Respondent's Registration No. 4,164,790 for the mark ADAM LOOPHOLE PRESENTS ROT APPAREL (the "LOOPHOLE Registration").

On July 18, 2013, the Board struck Respondent's previously submitted answer as non-responsive, argumentative and non-compliant with applicable rules of practice, entered default against Respondent, and instructed that by August 15, 2013, Respondent,

show good cause why judgment by default should not be entered against respondent in accordance with Fed. R. Civ. P. 55(b) and to file and serve a sufficient answer. The answer must comply with the Trademark Rules of Practice . . . and address each allegation set forth in the petition for cancellation, and only those allegations.

Default Order at pp. 3 – 6, 8. Respondent has done neither of those things. Instead, despite the Board's strong caution, on August 5, 2013 Respondent submitted another narrative, non-responsive, rambling and argumentative answer that Respondent attempts to excuse as a product of his lack of familiarity with applicable rules of practice. See *generally* Respondent's Statement of Good Cause and Answer to Petitioner's Petition for Cancellation dated Aug. 5, 2013 ("Respondent's Submission"). Thus, Respondent's Submission wholly fails to meet the Default Order's directives.

First, Respondent's Submission fails to make a showing of "good cause." None of the excuses Respondent advances (i.e., his asserted unfamiliarity with the rules of practice, his *pro se* status, and his claim to now be "vetting . . . attorneys," Respondent's Submission at p. 1) amounts to "good cause" to forgo default judgment or to excuse Respondent's past – and continuing – failures to adhere to applicable pleading standards. Respondent's position flies in the face of the Board's explicit warnings to Respondent in the Default Order, which stated:

Compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.

Default Order at pp. 11. Thus, “good cause” is absent – and default judgment should be entered – because Respondent plainly concedes his prior non-compliance with applicable pleading standards¹ and because his most recent “answer,” as discussed below, demonstrates Respondent’s continued flaunting of both those standards and the Board’s Default Order. See *Compania Interamericana Export-Import v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996) (“[I]f a party willfully defaults by displaying either an intentional or reckless disregard for the judicial proceedings, the court need make no other findings in denying relief [to the defaulting party].”).

More significantly, to establish “good cause,” a party in default “is required to make some showing of a meritorious defense as a prerequisite to vacating an entry of default.” *Hawaii Carpenters’ Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir.1986).² Here, Respondent’s Submission fails to demonstrate a meritorious defense or to even attempt to do so. See Respondent’s Submission at p. 1. Accordingly, the Board should not entertain a request from Respondent to set aside default. See *Smith v. Block*, 784 F.2d 993, 996 n. 4 (9th Cir.1986); *Hawaii Carpenters’ Trust*, 794 F.2d at 513 (“To permit reopening of the case in

¹ See Respondent’s Submission at p. 1 (“My prior answer . . . did not meet the Standard Procedural requirement for an answer.”).

² See also *Compania Interamericana Export-Import v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996); 10 C. Wright, A. Miller, & M. Kane, FEDERAL PRACTICE & PROCEDURE, § 2697 (Supp.1992).

the absence of some showing of a meritorious defense would cause needless delay and expense to the parties and court system."). Respondent has wholly failed to present "good cause" to either set aside the prior entry of default or to postpone the Board's entry of final default judgment against him in this cancellation proceeding.

Additionally, the "answer" contained within Respondent's Submission does not comply with the Board's Default Order and again fails to adhere to the rules of practice. As the Board told Respondent, the rules require Respondent to either admit or deny the paragraphs of Petitioner's complaint:

Respondent should not argue the merits of the allegations found in the complaint but rather should simply state, as to each of those allegations, that the allegation is either admitted or denied.

Default Order at p. 7 (citing Trademark Rule 2.106(b)(1), Fed. R. Civ. P. 8(b) and *Turner Entm't Co. v. Ken Nelson*, 38 USPQ2d 1942 (TTAB 1996)). The Board reiterated its warning a second time, stating,

respondent's answer should not argue the merits of the allegations in a complaint, but should simply state whether each allegation is admitted or denied, or whether respondent lacks sufficient information or knowledge to form a belief as to an allegation,

and cautioned Respondent against making "narrative arguments" in his answer.

Default Order at p. 5. As exemplified throughout Respondent's Submission, Respondent took little heed of the Board's caution or instructions. His answer is once again rambling and chock-full of narrative arguments, such as the following paragraph purportedly responding to Petitioner's brief statement in paragraph 26

of its Petition that the United States Patent & Trademark Office (“USPTO”) had issued an Office Action on Petitioner’s “R.O.T.” Mark application:

26. Registrant/Respondent again denies prior knowledge of USPTO’s office action dated September 28th, 2012, as alleged by petitioner stating, “ that a likelihood of confusion existed in class 25 and 26 between petitioner’s Rot marks and Registrant/Respondent’s Loophole mark.” Same denials and factual statements and averments as in paragraphs 25 apply. Registrant/Respondent also denies both marks sound alike and therefore confusingly similar. When Registrant/Respondent applied for the Loophole mark and was granted its registration, literary elements were bypassed, such as sounds, phrases, pictures and symbols. The look and feel of its products and services were ingrained in its consumers as to know and appreciate where the products came from. Qualities such as look, the meaning, the wordings, the prefixes and suffixes, phrases, pictures, logos, and the symbol all collectively distinguished the Loophole mark from any potential conflict with another. Registrant/Respondent in denying petitioners claimed significant effect of USPTO office action, however refers the TTAB to the following case that is contrary to the position of the alleged office action. In B&B Hardware, Inc V. Hargis Industries 2013 wL 1810614, 2013 US APP Lexis 8926 (8th Circuit May 1st, 2013) “...the factors the TTAB considers for trademark registration purposes differed from the factors considered under the 8th circuit likelihood of confusion tests for trademark infringement. In particular a TTAB test places greater emphasis on appearance and sound of the marks, while the 8th circuit test places greater emphasis on marketplace usage of the marks and products” (Kaye Scholer, intellectual property attorney, in “Emerging trends: 8th circuit holds that TTAB determination of likelihood of confusion is not binding on subsequent infringement action”). In essence, Registrant/Respondent therefore denies the effect of petitioners alleged USPTO September 28, 2012 office action opinion as controlling and trend setting. Registrant/Respondent in referencing the above case, The US Court of Appeals for the 8th circuit held that a trademark trial and appeal board’s (TTAB) decision on likelihood of confusion was not entitled to preclusive effect in a federal trademark infringement action, and that it was not an abuse of discretion for a district court to reject admission of the TTAB decision into evidence.

Compare Respondent’s Submission at p. 5, para.26 *with* Petitioner’s Petition to Cancel at para. 26. Respondent’s rambling, narrative answer to that paragraph visibly fails to respond to the substance of that paragraph’s unambiguous allegation directed to the existence of – not Respondent’s “prior knowledge” of – certain USPTO office actions. So once again, Respondent circumvents admitting to a fact that is easily ascertainable from and readily established by the USPTO’s online public trademark records.

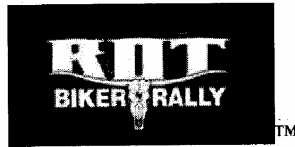
Respondent similarly refuses throughout his “answer” to either admit or deny numerous verifiable, public-record matters alleged in Petitioner’s Petition to Cancel – such as the existence, ownership and date of issuance of several U.S. trademark registrations, various USPTO office actions, and court judgments declaring Petitioner’s ROT Marks valid, enforceable and famous. See, e.g., Respondent’s Submission at paras.8-10, 24-28 (wherein Respondent side-steps admitting or denying probative alleged facts by instead asserting the non-sequiter that “Registrant/Respondent denies prior knowledge of” the alleged fact, despite no allegation concerning his knowledge). Therefore, Respondent’s “answer” again fails to adhere to fundamental rules applicable to pleadings,³ in part because Respondent refused to make the minimal investigative effort required of him under the rules to properly answer the Petition.⁴ And by these action, Respondent unfairly deprives Petitioner and the Board of the ability to expeditiously proceed with this matter on what should be incontrovertible facts.

³ “A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.” Fed. R. Civ. P. 8(b)(4). “A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.” Fed. R. Civ. P.. 8(b)(5). See also *State Farm Mut.Auto. Ins. Co. v. Riley*, 199 F.R.D. 276, 278 (N.D. Ill. 2001) (discussing pleading standards for a defendant’s answer).

⁴ See *Djourabchi v. Self*, 240 F.R.D. 5, 12 (D.D.C. 2006) (before answering complaint, a party must make a reasonable effort to determine whether information is available to it); *Chicago Dist. Council of Carpenters Pension Fund v. Balmoral Racing Club, Inc.*, No. 00 C 2375, 2000 WL 876921, at *1 (N.D. Ill. June 26, 2000) (“No reason appears why [defendant] should not respond by admitting any allegation that accurately describes the content of whatever part of a document is referred to.”); *American Photocopy Equip. Co. v. Rovico, Inc.*, 359 F.2d 745, 746-47 (7th Cir. 1966) (party may not claim lack of sufficient knowledge or information when the matter at issue is clearly within its own knowledge).

Due to Respondent's non-responsive answers to the Petition's allegations, Respondent's purported "answer" wholly fails to refute dispositive allegations in the Petition going directly to the LOOPHOLE Registration's dilution of and confusion with Republic's famous ROT Marks (including the marks "ROT" and "R.O.T."). Indeed, a federal court already decided that each of Petitioner's ROT Marks is distinctive, valid, famous and owned by Petitioner Republic:

(2) Plaintiff Republic of Texas Biker Rally, Inc. ("Republic") is the owner of the trademarks and service marks *ROT RALLY®*; *R.O.T. BIKER RALLY®*; *ROT BIKER RALLY®*; *R.O.T. BIKER RALLY®*; and *REPUBLIC OF TEXAS BIKER RALLY®*) and the federal trademark registrations thereon (collectively, "Republic's Registered Marks") and all associated goodwill. Republic is also the owner of the common law trademarks and service marks *R.O.T.™*, *ROT™*, and the ROT Cow Skull Logo & Design (pictured immediately below) and all associated goodwill.



(3) By virtue of Republic's long, continuous and exclusive use of Republic's Registered Marks and of the *R.O.T.™*, *ROT™*, and the ROT Cow Skull Logo & Design marks and by virtue of Republic's extensive marketing efforts associated therewith, each of Republic's Registered Marks and the *R.O.T.™*, *ROT™*, and ROT Cow Skull Logo & Design marks are famous within the meaning of 15 U.S.C. 1125(c) and have become distinctive of Republic's goods and services

(4) Each of Republic's Registered Marks and each of Republic's Common Law Marks is distinctive, valid and enforceable and all of such marks are protectable as trademarks of Republic.

See Republic of Texas Biker Rally, Inc. v. Bikinis Bar & Grill, LLC., No. 10-CV-00697, Judgment [Dkt. No. 55], (W.D. Tex. July, 11, 2011) (Sparks, J.); *see also* Petition at ¶ 24.⁵ Respondent's "answer" simply disregards this federal judgment and its findings confirming that Petitioner owns the ROT Marks and that they are valid, enforceable and famous. Similarly, Respondent side-steps around the fact that an Examiner has already found a likelihood of confusion to exist between Respondent's LOOPHOLE Registration and Petitioner's pending "ROT" and "R.O.T." applications for registration, Serial Nos. 85/419,354 and 85/418,830. *Compare* Petition at ¶¶ 25-26 *with* Respondent's Submission. (Accordingly, Respondent's materially non-compliant "answer" should once again be stricken.)

For the forgoing reasons, Respondent has not shown good cause why default judgment should not be entered against him. Moreover, he has not submitted an answer complying with the rules, and has wholly and materially failed to comply with the Board's Default Order's directives. *See* Default Order at pp. 5 - 6. Accordingly, the Board should enter final default judgment against Respondent and immediately cancel Respondent's LOOPHOLE Registration No. 4,164,790.

⁵ A copy of this Judgment is attached to Petitioner's prior submission dated February 16, 2013.

Respectfully submitted,

LAW OFFICES OF CARL F. SCHWENKER

By: _____ /s/

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Attorneys for Petitioner
Republic of Texas Biker Rally, Inc.

Dated: August 15, 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2013, I served this **PETITIONER'S REQUEST FOR FINAL DEFAULT JUDGMENT ON RESPONDENT'S NON-COMPLIANCE WITH THE BOARD'S DEFAULT ORDER** by mailing a copy thereof by First Class Mail, postage prepaid, addressed to Respondent's correspondence address of record as follows:

Peter C. Ogudo
P.O. Box 2574
Culver City, California 90231

By: _____ /s/
Carl F. Schwenker